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In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER R. CONLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of eight counts of willfully preparing false income tax returns for other persons, in violation of 26 U.S.C. 7206 (2); one count of destroying tax returns filed with the Small Business Administration, in violation of 18 U.S.C. 2071(a); and one count of submitting to the Small Business Administration a copy of a false income tax return, in violation of 18 U.S.C. 1001 (Pet. App. A-5). The district court sentenced petitioner to concurrent terms of two years on each of the ten counts, which it suspended, and placed petitioner on probation for two years (Pet. App. A-2). The court also fined petitioner $1,000 on each of four counts involving preparation of false returns and also on the charge involving a false statement to the Small Business

Administration (Pet. App. A-2). The court of appeals affirmed (Pet. App. A-4 to A-12).

The evidence can be summarized as follows: In the aftermath of a hurricane, petitioner, a licensed public accountant, assisted many of his clients to obtain disaster relief loans from the Small Business Administration. On January 18, 1974, he accompanied a client named Thomas Gill to the Elmira, New York office of the Small Business Administration in order to meet with an official named James Cristofero. Cristofero testified that he showed petitioner and Gill copies of Gill's income tax returns which had been submitted to the Small Business Administration, on January 4, 1974, in support of Gill's application for a loan and requested assurance that the originals had been filed with the Internal Revenue Service (Pet. App. A-6). Cristofero then asked Gill to sign the copies as the taxpayer and petitioner to sign them as preparer, which they did. Cristofero then gave petitioner a memorandum stating that the Small Business Administration would verify the information on the returns with the Internal Revenue Service. Petitioner thereupon seized the signed copies and put them in his briefcase. Despite Cristofero's warning to petitioner that he was destroying government property, petitioner ignored Cristofero's demand for their return and began to tear them up and stuff the pieces in his clothing (Pet. App. A-6 to A-7).

Cristofero then summoned two FBI agents from the local office who witnessed petitioner destroying the documents. When the agents asked petitioner what he was doing he did not respond. About 30 minutes later, the agents arrested petitioner and gave him *Miranda* warnings. One of the FBI agents testified that about an hour after petitioner's arrest, petitioner suddenly and without solicitation broke his silence and stated that he and Gill had not submitted the destroyed documents

to the SBA on January 4, that instead he had brought them to the SBA on that very day, January 18. When the torn pieces were recovered and pieced together, it was discovered that they overstated the amount of Gill's disaster loss by more than $100,000 (Pet. App. A-7).

Petitioner's sole argument (Pet. 4-9) is that the trial court erred in permitting the introduction of testimony of his silence at the time of his arrest. The first mention of petitioner's silence came during the direct examination of Cristofero regarding events preceding the entry of the FBI agents. Cristofero testified that while petitioner was tearing up the tax returns he asked petitioner what he was doing and advised him that destroying government documents was a crime, and that petitioner said nothing (Tr. 59).[1] During the cross-examination of Cristofero, petitioner's counsel repeatedly asked him whether it was true that from the outset petitioner told Cristofero that he had brought the documents with him to the office that day and that he intended merely to leave with what he had brought (Tr. 114-116). This was the version later testified to by petitioner himself (Pet. App. A-8), a version foreshadowed not only in the cross-examination of Cristofero but in the opening statement of petitioner's counsel to the jury, in which he stated that there would be a question raised "as to who actually owned these documents * * * and who had a right to these papers on that day" (Tr. 18). When it became clear that petitioner was adopting the position that the

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[1] "Tr." refers to the trial transcript.

Petitioner does not appear to object to the admission of Cristofero's statement on direct examination that petitioner said nothing when asked what he was doing at the time he was tearing up the tax returns. This testimony described the events relating to the commission of the crime and petitioner's silence was therefore part of the *res gestae* of the offense.

documents he destroyed were those that he had brought on January 18, the prosecutor sought to elicit testimony that would refute that version of the facts. One of the FBI agents testified that when he and the other agent arrived at the Small Business Administration offices, they asked petitioner what he was doing, that he did not respond, that he was then arrested and given his *Miranda* rights, and that he continued to remain silent. The other FBI agent corroborated that testimony but stated that, about an hour after his arrest, petitioner voluntarily broke his silence and offered his exculpatory version of the events (Pet. App. A-8).

The court of appeals correctly held that the testimony concerning petitioner's silence was properly admissible. As the court of appeals stated (Pet. App. A-8), petitioner's "contentions concerning the making of exculpatory statements raised an issue which the Government was entitled to meet." Petitioner advanced the theory that he had spoken in an exculpatory manner throughout the incident; "having thus raised the question * * *, [petitioner] opened the door to a full and not just a selective development of the subject." *United States* v. *Fairchild*, 505 F. 2d 1378, 1383 (C.A. 5).

Doyle v. *Ohio*, 426 U.S. 610, upon which petitioner relies (Pet. 6, 7-8), is distinguishable. In *Doyle*, the defendants took the stand and gave an exculpatory story that they had not previously told to the police or the prosecutor. The prosecution thereafter cross-examined as to why they had not given the arresting officer the exculpatory explanations. The Court held that the prosecutor's use for impeachment purposes of the defendants' silence at the time of arrest and after they received *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment. The Court stated that "every post-arrest silence is insolubly ambiguous because of what the State

is required to advise the person arrested" (426 U.S. at 617-618).

But the Court explicitly recognized in *Doyle* "that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest" (426 U.S. at 619-620, n. 11). That is precisely the situation here. Petitioner claimed at trial that he had spoken throughout the episode and that he had told both Cristofero and the FBI agents that the documents he had destroyed were those that he had brought with him on January 18. Under these circumstances, the prosecutor could introduce evidence as to petitioner's silence to show that he had made no such claim during the episode. While the better course for the trial court would have been to caution the jury that evidence of petitioner's silence was admitted solely to rebut his version of the event, the court of appeals properly held that the admission of the evidence did not deprive petitioner of a fair trial (see Pet. App. A-8).[2]

Petitioner argues (Pet. 7-8) that before the testimony concerning his silence could be admitted it would have been necessary for him to testify that he had told Cristofero and the FBI agents from the outset that he had brought the documents with him that same morning. Thus, in petitioner's view, the testimony would be admissible only as rebuttal evidence by the government. But whether the defense position is made clear by testimony of the defendant himself or by repeated cross-examination of

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[2]*Grunewald* v. *United States*, 353 U.S. 391, and *United States* v. *Hale*, 422 U.S. 171, upon which petitioner also relies (Pet. 6), are likewise distinguishable. They do not involve a situation in which the defendant "opens the door" to the introduction of testimony concerning his post-arrest silence.

a government witness (Tr. 114-116), the result is the same. The government has a right to meet a contention, whether it is made directly or indirectly.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[3]Petitioner also argues (Pet. 2, 5) that the government should not have brought out the fact that petitioner requested counsel from the outset. But the record shows that it was petitioner's counsel, not the government, who first brought out that fact (Tr. 115-116; Pet. App. A-24 to A-25).